STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF PONTIAC,
Respondent-Public Employer,

Case No. C04 G-189

-and-

MICHIGAN ASSOCIATION OF POLICE,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Keller Thoma, P.C., by Bruce M. Bagdady, Esq., for the Public Employer

Pierce, Duke, Farrell, Mengel & Tafelski, PLC, by M. Catherine Farrell, Esq., for the Labor Organization

DECISION AND ORDER

On September 23, 2005, Administrative Law Judge (ALJ) Roy L. Roulhac issued his Decision and Recommended Order in the above captioned matter finding that Respondent City of Pontiac (City) did not breach its duty to bargain when it failed to submit a tentative agreement reached with Charging Party, the Michigan Association of Police (Union), to its City Council for a ratification vote. The ALJ concluded that Respondent did not violate Section 10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a) and (e), as alleged in the charge and recommended that the charge be dismissed.

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On October 17, 2005, Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order. Respondent filed a response to the exceptions on October 26, 2005. In its exceptions, Charging Party asserts that the ALJ erred in finding that the Employer's failure to bring the tentative agreement to the City Council for a vote did not constitute an unfair labor practice. For the reasons set forth below, we find that the exceptions have merit and conclude that Respondent violated its duty to bargain in good faith.

Facts:

Charging Party and Respondent were parties to a collective bargaining agreement that expired on December 31, 2003. They reached tentative agreement on a new contract on December 19, 2003, which the Union's membership ratified. On December 22, 2003, the City was notified of the Union's ratification.

During a City Council agenda review meeting in January 2004, the parties discussed the tentative agreement, but it was not placed on the Council's agenda for formal action at its January 30, 2004 meeting because of concerns regarding language dealing with the release of employees' disciplinary files. Thereafter, the parties returned to the bargaining table and, on May 7, 2004, with a mediator's assistance, they reached agreement on the language that had been of concern to the City Council.

In late May 2004, the tentative agreement was again presented to the City Council during an agenda review meeting. The City's Finance Director and bargaining team member recommended that the agreement be rejected because the City could not afford it, and the City's Labor Relations Director and chief negotiator also withdrew his support. The tentative agreement was not placed on the agenda for formal action by the City Council in May or any month thereafter and there has been no formal action by the City Council to accept or reject the tentative agreement.

The Union filed the instant charge on July 15, 2004, alleging that the City violated Sections 10(1)(a) and (e) of PERA, MCL 423.210(a) and (e). After a hearing, the ALJ concluded that Respondent did not violate its bargaining obligation and recommended that the Union's charge be dismissed. We disagree with the ALJ's conclusion for the reasons that follow.

Discussion and Conclusions of Law:

Unlike private employment, where collective bargaining agreements are often finalized at the bargaining table, such agreements in public employment usually require ratification by the public employer's governing body. The ALJ correctly observed that we have not held that a governing body can only reject a tentative agreement by formal action at an open meeting. However, we have held that the duty to bargain requires a party to "act expeditiously and decisively to accept or reject a tentative agreement." *Teamsters State, Co, and Municipal Workers, Local 214*, 1998 MERC Lab Op 72, 77, citing *Saginaw Intermediate Sch Dist*, 1981 MERC Lab Op 914 and *Royal Oak Twp*, 1973 MERC Lab Op 59 (no exceptions).

There is conflicting testimony as to whether the Union was given assurances that the City would ratify the tentative agreement. Fred Timpner, the Union's President and a member of its bargaining committee, testified that Larry Marshall, the City's Labor Relations Director and chief negotiator, told him not to worry because the City was going to ratify, a claim that Marshall denied. We need not resolve this conflict because no claim is made that the City ever told the Union that the tentative agreement had been

rejected. Rather, Marshall testified that he had discussions with union representatives about the Council's concerns about the City's "financial situation." He could not recall when these discussions occurred and offered: "I don't think we had a formal meeting. I mean, there were no formal meetings regarding just that issue."

Although a tentative agreement was reached in May of 2004, it was not until November 4, 2004, while the instant charge was pending, that Marshall wrote a letter to the Union summarizing the negotiations that resulted in the tentative agreement, reiterating the concern expressed by the City Council for the City's finances, and inviting "recommendations as to how we can continue to provide services and control costs." Even at this late date, there was no clear or explicit expression by the City of a rejection of the tentative agreement.

In its argument to this Commission, the City suggests that its expression of concern for its finances somehow imposed upon the Union a duty to request bargaining. To the contrary, we hold that where the City's concerns affected its ability to accept the tentative agreement, it had a duty to expeditiously and decisively notify the Union of its decision to reject the agreement, providing its reasons for rejection, in order to facilitate further bargaining in light of those reasons. Its failure to do so was a breach of the duty to bargain in good faith.

ORDER

Respondent, City of Pontiac, its officers, and agents shall:[1]

1. Cease and desist from refusing to bargain with Charging Party, Michigan Association of Police, by failing to accept or reject the tentative agreement in a timely and proper manner.
2. Cease and desist from, in any other manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 9 of PERA.
3. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all locations where notices to employees are customarily posted. Copies of the notice shall be duly signed by a representative of the City of Pontiac and shall remain posted for a period of thirty consecutive days. One signed copy of the notice shall be returned to the Commission and reasonable steps shall be taken by the Employer to ensure that said notices are not altered, defaced, or covered by any other material.
4. Notify the Michigan Employment Relations Commission within twenty days of receipt of this Order regarding the steps that the Employer has taken to comply herewith.

[1] Because Charging Party is currently engaged in arbitration under Act 312, in Case No. D03 J-2467, we decline to order an affirmative bargaining remedy.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the **City of Pontiac** has been found to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain with the Michigan Association of Police, by failing to accept or reject the tentative agreement in a timely and proper manner.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by Section 9 of PERA.

CITY OF PONTIAC

By: _____

Title: _____

Date: _____

This notice must be posted for a period of thirty consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510

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DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan, on April 1, 2005, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based on the record and post-hearing briefs filed by June 1, 2005, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charge:

On July 15, 2004, Charging Party filed an unfair labor practice charge alleging that Respondent violated Section 10(1)(a) and (e) of PERA by failing or refusing to present a tentative agreement reached by the parties to its City Council for ratification.

Findings of Fact:

The essential facts are undisputed. Charging Party and Respondent were parties to a collective bargaining agreement that covered the period January 1, 2000 through December 31, 2003. Bargaining for a successor contract began in June 2003, and six months later, on December 19, the parties reached a tentative agreement. Before becoming a binding contract, the tentative agreement needed to be ratified by Charging Party's members and the City Council. The Union's membership ratified the tentative agreement on December 19, 2003. On December 22, Charging Party sent a letter to Respondent notifying it of the membership's ratification.

During the City Council's January 2004 agenda review, the tentative agreement was discussed.[2] However, the tentative agreement was not placed on the Council's January 30 agenda for formal action because of the Council's concern over language in Article 12.11 of the tentative agreement dealing with the release of employees' disciplinary files. Thereafter, the parties returned to the bargaining table. According to Respondent's chief negotiator and labor relations director Larry Marshall, during the negotiations regarding Article 12.11 he told Donnell Reed, Charging Party's president; Joel Felt, Charging Party's business agent; and Fred Timpner, Charging Party's executive director, that it was in their best interest to stop arguing about Article 12.11's language because the City's financial situation was not as strong as he previously thought. On May 7, 2004, with a mediator's assistance, the parties reached agreement on Article 12.11.[3]

In late May 2004, the tentative agreement was again presented to the City Council during an agenda review meeting. Finance director and bargaining team member J. Edward Hannan recommended to the Council that the economic offer contained in the tentative agreement be withdrawn because the City could not afford its $753,060 estimated cost. Hannan testified that in May 2004, the City's estimated budget deficit had grown from $3 million, when the 2004-2005 budget was prepared, to $5 million. Marshall testified that because of the City's financial problems, he also could no longer recommend that the Council approve the tentative agreement.

After Council's May agenda review meeting, Hannan and Marshall met with Reed and representatives of other unions to discuss the Council's concerns about the financial state of the City. On November 4, 2004, Marshall wrote a letter to Charging Party. The letter reads, in part, as follows:

> As you are probably aware, the city has been faced with rapidly increasing financial problems. Decreasing levels of State support and the impact of a weak economy on our own income tax receipts has created a serious financial situation, as evidenced by a reported June 30, 2003 General Fund deficit of $5.15 million. We are now also faced with accommodating large increases in our required police and fire pension payments, which will only compound our problem in the near term.
>
> We are currently discussing ways to overcome the General Fund deficit with the Pontiac City Council and, as you are aware, have requested our labor organizations to provide recommendations as to how we can continue to provide services and control costs. We do, however, remain

[2]During agenda review meetings, the City Council and Mayor discuss issues to be included on the Council's agenda for their formal meeting the following week.

[3]Article 12.11 initially read: "Where required by law, the City may maintain files for more than three years (3) years; however, these files shall not be released except by a subpoena from a court of competent jurisdiction." The parties agreed to change Article 12.11 to read: "Where required by law, the City may maintain files for more than three (3) years. However, these files shall not be released except in accordance with State and Federal laws."

committed to finding a resolve [sic] to bringing finality to establishing a successor agreement for the Pontiac Police Officers Association.

Conclusions of Law:

Under Section 15 of PERA, a public employer has a duty to bargain over ". . . wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising under the agreement, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or require the making of a concession." MCL 423.215(1)

Charging Party would have this tribunal believe that Section 15 requires a public employer's governing body to vote, in an open meeting, to ratify or reject a tentative agreement. It has, however, presented no support for this assertion. *Township of Royal Oak*, 1973 MERC Lab Op 59 (no exceptions), which Charging Party cites as the longstanding case on point, does not address the issue presented here. In *Royal Oak*, the Commission found that the employer had engaged in bad faith bargaining based on a combination of factors. In addition to failing to vote on a tentative agreement, the employer in *Royal Oak* unilaterally discontinued payments under the interim agreement; bluntly advised the union that it would no longer abide by it and did not offer any alternatives; and agreed to further meetings but failed to appear at the appointed times. Nowhere in Section 15 of PERA or in *Royal Oak* is there any suggestion that an employer is required to vote to approve or reject a tentative agreement in an open meeting.

The concept of ratification implies the right of either party to accept or reject the agreement reached by its agents at the bargaining table, although it must do so in good faith. *Genesee Co*, 1982 MERC Lab Op 84. It is well settled that to become a final and binding contract, a tentative agreement must be ratified by formal action of the governing body of a public employer. *Shelby Twp*, 1989 MERC Lab Op 704, 708; *City of Hamtramck*, 1975 MERC Lab Op 723, 733. The Commission, however, has never held that a governing body must reject a tentative agreement by formal action in an open meeting. See, e.g., *Clare-Gladwin* ISD, 1987 MERC Lab Op 1021, 1023, where the employer was found not to have violated its duty to bargain when a committee of the school board rejected two tentative agreements without placing the proposals before the full board.

The evidence presented in this case shows that the parties' tentative agreement was presented to the City Council for its consideration during agenda review meetings in January and May 2004. Although the Council did not formally vote to approve or reject it during either meeting, its concerns about it were communicated to Charging Party. After the January meeting, Charging Party agreed to return to the bargaining table. However, after the May meeting, the instant unfair labor practice charge was filed. I find that Respondent did not violate its bargaining obligation by not voting to accept or reject the tentative agreement in an open meeting.

I have carefully considered all other arguments advanced by Charging Party and conclude that they do not warrant a change in the result. Based on the above discussion, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Roy L. Roulhac
Administrative Law Judge

Dated: _____